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OCTOBER TERM, 1985

NO. 85-314

FLOYD JAMES, WARDEN . . . . . Petitioner

V.

SHIRLEY TYLER . . . . . Respondent

RESPONDENT"S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

NO. OCTOBER TERM, 1985

85-314

FLOYD JAMES, WARDEN PETITIONER

V.

SHIRLEY TYLER RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below from the United States Court of Appeals for the Eleventh Circuit is reported in Tyler v. Kemp, 755 F. 2d 741 (11 Cir. 1985).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC Sect. 1257 (3).

QUESTION PRESENTED

1. Is There A Substantial Federal Question Presented For Review By This Court As A Result Of A Finding Of Ineffective Assistance of Counsel.

STATEMENT OF THE CASE

The Court in Tyler v. Kemp, 755 F 2d 741 (11th Cir. 1985), sets out the relevant facts in deciding that defense counsel was ineffective at the time of sentencing. The State's petition claims that "most of the evidence identified by the circuit court as being 'mitigating' was presented by the jury through the testimony of the Respondent and her son on the guilt/innocence phase of the trial, including the lack of any

prior criminal record" (Petition For Certiorari, p-15)[1] No reference is made to the trial transcript to support this claim, and counsel for respondent can find nothing in the testimony of Tyler or her son to support this claim.

Argument

2. No Substantial Federal Question Is Presented For Review By This Court By The Holding That Counsel Was Ineffective At Sentencing.

Petitioner bases his petition on the grounds that the Eleventh Circuit misapplied the standards set out in Strickland v. Washington, _____ U.S. _____, 104 S. Ct. 2052 (1984). Defense counsel, Richard Bishoff, graduated from law school in March of 1979 and was admitted to the bar in June, 1979. He was appointed to represent respondent in November of 1979, and his sum total of criminal court experience was one day and a half in August of 1979, and it appears he never tried a criminal jury trial prior to being appointed. Shirley Tyler has no prior record, had worked and supported the family for several years, her husband had a violent character and abused her. She was a good mother to her three children, and several relatives were willing to testify as a character witnesses if they had been called. In Lockett v. Ohio,438 US 586, this Court held that a defendant has the right to

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1 It would appear that if there was mitigating evidence presented in the guilt/innocence phase the Eleventh Circuit would have set aside the death penalty on the grounds that the jury charge regarding mitigating circumstances was constitutionally inadequate. Tyler v. Kemp, 755 F.2d at page 746, 747. See also Spivey v. Zant, 661 F.2d 464 (5th Circuit Unit B 1981); Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); Finney v. Zant, 709 F.2d 643,647 (11th Cir. 1983); Westbrook v. Zant, 704 F. 2d 1487 (11th Cir. 1983).

The Court below concluded that the charge was defective, but held it did not effect the outcome of the trial since no mitigating evidence was presented.

introduce virtually any evidence in mitigation at the penalty phase.

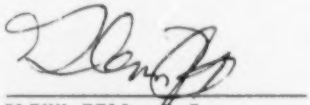
In Strickland v. Washington, supra, this court set out a two-part test in order to determine if counsel was ineffective. First, did counsel in fact render a deficient performance. It is frankly difficult to imagine a more unsatisfactory and incompetent performance by Bishoff in failing to present any evidence at the sentencing phase. This cannot be considered a strategic decision since calling her employer as a character witness and stipulating that she had no criminal record could only benefit Mrs. Tyler. The second part is whether counsel's performance was so deficient that it was prejudiced to the defense. Clearly this investigating evidence would probably have resulted in a life sentence for respondent. See also King v. Strickland, 748 F 2d 1462 (11th Cir. 1984). The primary responsibility for insuring that these mitigation consideration are presented to the sentencing authority falls squarely upon the defense counsel. A substantial failure to obtain and present such information plainly constitutes ineffective assistance of counsel. See Mason v. Balkom, 531 F. 2d 717, 724 (5th Cir. 1976); United States v. Pinkney, 531 F. 2d 1241, 1248 (D.C. Cir. 1976).

Conclusion

Respondent submits that the decision of the United States Court of Appeals affirming the United States District Court was based on a proper application of the holding in Strickland v. Washington, supra.

As the Eleventh Circuit has pointed out "No court should appoint an inexperienced lawyer to represent the defendant in a death penalty case. The risks to defendant, counsel, the judicial system and the community at large are too great...." Tyler v. Kemp, supra, at page 746.

For the reasons stated above, it is respectfully contended by respondent that the Petition for Writ of Certiorari should be denied.



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CERTIFICATE OF SERVICE

I, Glenn Zell, do hereby certify that I have served a copy of the foregoing document to the person listed below by depositing said copy in the United States mail in a properly addressed envelope with adequate postage thereon to:

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This 11 day of November, 1985.

GLENN ZELL, P.C.